No. 85-1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF PLEASANT GROVE,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

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BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Can the annexation of vacant land or land populated by one white family by a municipality with no black voters deny black voters the right to vote on account of race or color?

2. Can a failure to change a voting practice such as a failure to annex ever be a violation of Section 5 of the Voting Rights Act when Section 5 itself refers only to changes in a voting practice?

3. Can the annexation of vacant land or land populated by one white family be invalidated by a subsequent failure to annex land populated by black persons, where the failure to annex would not lead to a retrogression in black voting rights, but annexation of the land populated by blacks would lead to a retrogression in their voting rights?

4. Did the City of Pleasant Grove bear its burden of proof of showing that the annexation of Pleasant Grove Highlands would be economically disadvantageous by submitting proof, which the Government conceded to be accurate, that revenues derived from the annexation of Pleasant Grove Highlands could not reasonably be expected to exceed between 14% and 28% of increased expenditures?*

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*The City of Pleasant Grove and the United States of America were the only parties to the proceedings before the United States District Court.

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia, dated August 3, 1983, denying appellant's motion for summary judgment and its motion for partial summary judgment (J.S. App. 1b-17b) is reported at 568 F. Supp 1455. The opinion of the United States District Court for the District of Columbia dated October 25, 1985, denying appellant's claim for declaratory relief (J.S. App. 1a-26a) is reported at 623 F. Supp. 782.

JURISDICTION

This is an appeal from the decision of a 3-judge court convened pursuant to Title 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, denying a request for a declaratory judgment that certain proposed annexations did not have the purpose or effect of denying or abridging the right to vote on account of race or color. J.S. App. A and C. This Court has jurisdiction under 42 U.S.C. §1973c to review the decision by way of appeal.

On December 19, 1985, appellant filed with the United States District for the District of Columbia a notice of appeal to this Court. J.S. App. D. This Court noted probable jurisdiction on May 19, 1986.

STATUTE INVOLVED

Section 1973c of Title 42 of the United States Code provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973(b) of this title are in effect shall

> enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney

General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. [Emphasis in original text]

STATEMENT OF THE CASE

The City of Pleasant Grove (hereinafter "Pleasant Grove") is a municipal corporation located in Jefferson County, Alabama. Record, Document 4, p. 1.[1] Although Pleasant Grove has a few black residents, 32 out of total population of 7,086 as of May 12, 1981 (JA 8-9),[2] at the time the annexation decisions in question here were taken all the registered voters were white (JA 10).

Pleasant Grove was incorporated in 1933. JA 4-5. Over the course of the last 53 years, the city has approved four annexations. In 1945, an uninhabited parcel of less than 40 acres was added on the southeastern corner of the city. JA 5-6 and Ex. B.[3] In 1967, after preclearance by the Department of Justice, the city annexed three non-contiguous parcels. Parcel I, consisting of approximately 120 acres, was entirely developed then and still is. JA 6 and Ex. B. Parcel II, consisting of approximately 1,320 acres, had approximately 40 white residents in 1967 and approximately 900 white residents as of February, 1981. JA 6 and Ex. B. Parcel III, consisting of less than 40 acres had approximately 150 white residents in 1967 and approximately 230 residents, 205 whites and

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[1] The District Court Record is not paginated. The individual documents are numbered as set out on the docket sheet. The Government suggested, Pleasant Grove agreed, and the Court ordered that the decision be rendered on the record as a whole (Document 60, pp. 2, 6), so everything in the record has been admitted into evidence. Accordingly, the record will be referred to by document (D.), exhibit (Ex.), and page (p.).

[2] The 32 blacks were residents of Pleasant Grove's nursing homes. D. 24, Ex. C, Ex. D. The Government has not alleged that Pleasant Grove has denied the nursing home residents their voting rights and the district court treated the city as all-white for voting purposes. J.S. App. 2b n.3.

[3] Ex. B is the 1979 postal map of Pleasant Grove.

25 blacks (the nursing home residents), as of February, 1981. JA 6 and Ex. B. In 1969, the city annexed a 40-acre parcel to the northwest, known as the "Glasgow Addition." This area had 14 white residents in 1969 and 20 as of February, 1981, all of whom were members of the Glasgow family. JA 7 and Ex. B.

In late 1978, owners of property on the western edge of Pleasant Grove contacted the Mayor, then Bobby R. Patrick, and requested that Pleasant Grove annex approximately 450 acres to the west of the city (the "Western Addition"). All of the land was completely uninhabited. JA 15. The owners of the property included the city itself (JA 10), and companies associated with Nathan Stott, a resident and long-established developer in the city (D. 70, pp. 6-8, 14), and Milton Russell, a resident, a long-established developer in the city, and a member of the City Council (D. 30d, pp. 5-6, 14, 27). Mayor Patrick brought the matter up at the meeting of the City Council of February 5, 1979. He showed the councilmen where the land proposed for annexation was located, described how the area would be subdivided, and recommended that the city adopt a resolution annexing the land. The resolution carried with one abstention. JA 15-16.

Patrick asked State Senator Mac Parsons in February, 1979, to introduce legislation in the Alabama State legislature which would accomplish the annexation. JA 16. Parsons introduced such a bill two weeks later. Parsons' main concern, and a matter of concern to everyone on the Jefferson County delegation, was that no one be annexed into Pleasant Grove without an opportunity to vote on the issue. D. 30g, pp. 6, 8-10, 14, 20. After Parsons and Patrick allayed State

Senator Vacca's concern that consent to the annexation among the property owners might not be unanimous, the bill was approved unanimously by the Jefferson County Senate delegation, which consisted of six whites and two blacks. D. 30g, pp. 12-14, 24. Parsons was unaware of any opposition to the bill in the Alabama House delegation which included six black members. D. 30g, p. 25. In his three years as a State Senator, Parsons did not know of any instance in which a populated area had been annexed to a city by legislative act. D. 30g, pp. 5, 21-22. The bill was advertised in the local newspapers in February and March, 1979, and on July 17, 1979, the Governor of Alabama signed the legislation into law. JA 6.

At a meeting held on March 5, 1979, the City Council decided to withdraw fire and paramedic service previously extended at no cost to neighboring areas. JA 18-19. On April 18, Patrick received an annexation petition from an area known as Five-Acre Road and a recently developed subdivision then known as West Smithfield Manor which later changed its name to Pleasant Grove Highlands (hereinafter "Highlands"). JA 16. The Highlands is in appearance equal economically to all but the newest subdivisions in the city. The Five-Acre Road area is economically depressed and below city standards. D. 74, p. 16, and attached photographs; D. 24 and attached photographs. At a council meeting held on May 7, 1979, representatives of the areas requesting annexation told the City Council that they desired annexation principally for fire protection. JA 16, 19. Thereafter, Patrick appointed a committee, chaired by Councilmember, later Mayor, Donald R. Morrison, Sr., to study the petition. JA 16. The committee concluded that the annexation of

the petitioning area would not be financially advantageous. D. 30f, pp. 19, 84-85; D. 30c, pp. 22, 26-28; D. 30b, pp. 10-15. They also discovered, however, that only one call for the city's fire and paramedic service had originated in the Highlands in 1978. Accordingly, based on the committee's recommendation, the City Council reinstated fire protection at no cost for the Highlands at its meeting of June 18, 1979. JA 16, 19.

Other than the annexation request of the Highlands and Five-Acre Road areas, the city has failed to act favorably on four annexation requests since 1933. JA 8-9. On August 18, 1969, the city received an annexation request from the white areas of Sylvan Springs and West Grove to the northwest of the city. D. 49, p. 1. After the city determined that United States Steel, an intervening property owner, did not wish the city to annex its intervening property, the city did not further pursue the request. D. 49, pp. 1-2; D. 63, pp. 7-14. Sometime in 1969, W. J. Kohler asked that a small parcel inhabited by whites to the southeast of the city be annexed. JA 8, and Ex. B. At a time never precisely established, the inhabitants of the white Westminster Subdivision petitioned for annexation. JA 8, and Ex. B. On October 1, 1979, the black Dolomite area petitioned for annexation. JA 9, and Ex. B. Mayor Morrison stated on behalf of the city in its answers to interrogatories that the Kohler, Westminster, Dolomite, and Highlands areas were not annexed because "[t]he City had plans to expend westward on undeveloped land and was not interested in considering any other annexations." JA 8-9. In his deposition Mayor Patrick testified that the Dolomite and the Five-Acre Road areas were not compatible economically with Pleasant Grove. D. 41g, pp. 91, 103-104. Any annexation, such as the proposed Kohler, Westminster, and Highlands annexations which expanded Pleasant Grove in the direction of Dolomite or the Five-Acre Road areas created what Patrick called the "mushroom" problem. D. 41g, pp. 55, 91, 103. If "you take one, [then] I think from the gentleman's standpoint you are going to find it difficult not to take the next one." D. 41g, p. 104, see p. 56.[4]

After completion of all Alabama state procedures, Pleasant Grove sought preclearance for the annexation of the Western Addition. By letter dated February 1, 1980, the Civil Rights Division of the Department of Justice denied preclearance on the ground that the city had not sought to annex "identifiably black areas" as well as the Western Addition. D. 24, Ex. F, p. 1. The city requested reconsideration (D. 24, Ex. G), but when it appeared that a favorable reconsideration would not be forthcoming, Pleasant Grove filed this action on October 9, 1980. D. 1.

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[4] The district court opinion and the Government's motion to affirm refer to a refusal to annex the site of the black Woodward School. J.S. App. 3a, n. 3; motion to affirm, p. 2. In the Government's opposition to the city's motion for summary judgment, the Government relied on the answers to defendant's second request for admissions, number 8, for this proposition. D. 35, p. 11. The city's answer to that request, however, was that the memory of the undersigned was not sufficiently clear to admit or deny the request. D. 23, p. 24. No motion to compel a further answer was filed. In any event, there is no evidence that the Woodward School site had any voters, white or black, so its significance in an examination of Pleasant Grove's pattern of annexation for voting purposes is limited.

Billy F. Graham, one of those signing the Highlands petition for annexation, went to a meeting in June, 1980, with Mayor Patrick. Patrick appeared upset because the Justice Department had objected to the annexation of the Western Addition. In July, 1980, Graham had a meeting with Albert Mason, another leader of the Highlands petitioners, and they decided to allow the Justice Department to handle the matter. D. 68, pp. 12-17, 31-32.

Morrison assumed the office of Mayor on October 6, 1980, and after discussing the matter informally with the newly elected Council, gave the Highlands the requested paramedic service at no cost as well. In March, 1981, Morrison appointed a new committee, the "Annexation Committee," to study the Highlands' annexation request. JA 19. This committee, consisting of Councilmen Pete Mosley, Clyde E. Morgan, and Joseph A. Cooper, met one time and considered documents provided by Mayor Morrison. Mosley and Morgan remembered discussing the figures submitted with the City Clerk and Treasurer, Sarah A. Mays. D. 66, pp. 16-17; D. 64, p.11. In the end, however, no further action was taken, in part because the matter was already in litigation. D. 66, pp. 13-21; D. 76, pp. 11, 17, 21-28; D. 64, pp. 7-9, 11, 23-25; D. 65.

As a condition of maintaining the action to preclear the Western Addition annexation, the district court required Pleasant Grove also to seek preclearance for the Glasgow Addition annexation, although Pleasant Grove represented that it would abandon that annexation rather than seek preclearance for it. D. 28; D. 32.

Pleasant Grove moved for summary judgment with respect to both annexations. It argued that since there

were only white voters in Pleasant Grove and in the Glasgow Addition and no voters at all in the Western Addition, these annexations could not have the effect of denying black persons the right to vote on account of race or color. D. 24; D. 42. Because there could be no effect, there was no basis for inferring a racial purpose. A purpose of denying blacks the right to vote in Pleasant Grove would best be served not by annexation of land but by a policy of no-growth, because the sale of any house in Pleasant Grove brought with it some chance that a black person would purchase it. D. 30d, pp. 27-28, 30-31. Pleasant Grove also argued that its failure to annex the Highlands was not subject to preclearance under Section 5 because it was not a change in a voting practice or procedure and that if it did attempt to annex the Highlands, instead of voting as a significant minority in Jefferson County where 2 of 8 State Senators of the County delegates are black, the blacks in the Highlands would vote as an insignificant minority in a city where all councilmanic seats are elected at-large (JA 15). The Department of Justice had never previously objected to an annexation where the municipality requesting annexation had no black voters and the area annexed had no black voters. *See* D. 15, pp. 2-4. Finally, Pleasant Grove argued that additional revenue from the Highlands was unlikely to exceed 14% of additional expenditure. JA 21-23.

The Government argued, based on the city's general racial history and on a particular examination of its annexation decisions, that Pleasant Grove had not demonstrated that its annexation decisions viewed as a whole were not racially selective. D. 35; D. 45.

The district court found that the record before it, if unrebutted, would warrant a finding that Pleasant Grove had discriminated on the basis of race in its annexation decisions. J.S. App. 5b. It determined that it was "clear from the precedents (1) that in the context of annexations, the Voting Rights Act applies if there is a discriminatory purpose irrespective of whether or not there is also a discriminatory effect and (2) that the failure to annex is a violation of the Act provided discriminatory purpose is shown." J.S. App. 10b. Accordingly, by a vote of 2 to 1, the court denied the motion for summary judgment. Judge George E. MacKinnon wrote in his dissent:

> . . . Since the annexations at issue do not *change* any existing minority voting rights and the Voting Rights Act only applies when there is some "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976), it is my view that the two annexations, one of which is inhabited by one non-minority family, cannot constitute a violation of the Voting Rights Act, regardless of the motives of the city. Accordingly, summary judgement is appropriate. [Emphasis in original text] J.S. App. 14b-15b.

Thereafter, the case was submitted to the district court on the entire record without trial. See D. 60, pp. 2, 6. Pleasant Grove argued, based on the entire record, (1) that the Highlands' petition was not treated less favorably procedurally than petitions from areas inhabited by white persons, (2) that Pleasant Grove's past practice had not been to annex areas which would

be excluded from annexation on the rationale which denied annexation to the Highlands, and (3) that the rationale advanced for denying annexation to the Highlands was supported by the evidence. D. 85. Pleasant Grove's past practice with respect to annexation had been to annex uninhabited or almost uninhabited land because the city derived a substantial proportion of its revenues from land development. Although there had been annexations to Pleasant Grove, or parts of annexations, where there were motivations other than the economic advantage of development fees, no annexation had taken in an area considered as a whole with a development density greater than 0.1 structure per acre, which was the development density of the Glasgow Addition. The Highlands, not including the Five Acre Road area which the Government conceded was not an appropriate area for annexation, had a development density greater than 1 structure per acre. D. 85, pp. 10-11, JA 5-7, and Ex. B. Only land development fees made annexation economically advantageous, because, as the Government had conceded in the course of the proceedings, revenues which could be expected to rise in approximate proportion to population if the city were to annex the Highlands would constitute only fourteen (14) to twenty-eight (28) percent of the city's expenditures depending on the year in which the calculation was made. JA 21-23; D. 75, Ex. 2.

The district court, again by a vote of two to one, ruled against Pleasant Grove. The court rejected the city's argument that its decisions to annex the "white" Western and Glasgow areas, but not the "black" Highlands were based not on race but on the city's economic self-interest. J.S. App. pp. 4a-5a. The

court found (1) that the city had never conducted an economic study to determine the advantages and disadvantages of a particular annexation, (2) that Pleasant Grove's reliance on the determination of its "Annexation Committee," made during the course of litigation, that the annexation of the Highlands was economically disadvantageous, was a sham, and (3) that substantively, Pleasant Grove's arguments concerning the cost of fire protection, street and sanitation, and police protection, and the loss of revenue from development fees if the Highlands were annexed were unpersuasive. J.S. App. la-l0a. Finally, the trial court found that Pleasant Grove had adopted discriminatory policies with respect to matters other than annexation which suggested that discrimination motivated Pleasant Grove's annexation policy as well. The trial court denied preclearance. J.S. App. 10a-11a.

In his dissent, Judge MacKinnon pointed out that the areas which the majority characterized as "white" were, in fact, entirely uninhabited (the Western Addition) or practically uninhabited (the Glasgow Addition) (J.S. 15a-17a), and that the racially discriminatory "purpose" required by the decisions in voting rights cases is a purpose related to voting (J.S. App. 18a-19a). Given the absence of a discriminatory effect, he wrote:

> It defies all reason and common sense to attribute to a governmental entity the purpose to achieve something that cannot conceivably be achieved. . . J.S. App. 20a.

He noted that this was the first case in which an objection had been raised to the annexation of a mu-

nicipality with no black voters. J.S. App. 21a. He concluded that the annexation should be approved on condition that Pleasant Grove be enjoined from taking any action affecting the Western and Glasgow Addition that would constitute any form of racial discrimination. J.S. App. 22a.

With respect to Pleasant Grove's economic argument, Judge MacKinnon wrote as follows:

> . . . there is one very good fiscal reason that Pleasant Grove should prefer annexation of the Western Addition to that of the petitions and indeed prefer annexing any undeveloped area to most inhabited developed neighborhoods. The following statement, based on deposition and exhibits, sums up the City's financial situation:
>
> *The City of Pleasant Grove derives most of its revenue, not from taxes or the other usual impositions of city governments, but from the sale of water and natural gas.* The City, through its Utilities Board, is the distributor of water and natural gas for the area of Alabama *which surrounds it.* [Mays affidavit,[5] para. 3]. In the year ending September 30, 1980, Pleasant Grove's "Total revenues and transfers" were $1,382,193. [Exhibit C to Attachment 3 to the Mays Affidavit]. "Revenues" contributed only $449,341 of this amount. $882,852 came from transfers from other funds." Of that $882,852,

[5] The Mays affidavit is reproduced in the joint appendix at JA 21-24.

> $871,852 was transferred from the Utilities Board of the City of Pleasant Grove. . . . *"Revenues" provided only 28% of Pleasant Grove's expenditures* in the fiscal year ending September 30, 1980. [H]owever, not all items under "Revenues" could be expected to increase in approximately proportion to population if Pleasant Grove were to annex [petitioners]. . . . [T]he items of *revenue which would grow proportionately with annexation total only $255,404, which is only 14% of "Total expenditures and transfers* for 1980. [Mays Affidavit, para. 4].

Plaintiff's Statement of Facts in Support of Motion for Summary Judgment at 10-11 (emphasis added). According to the deposition of the City's clerk and treasurer, Sarah Mays, the updated figure for revenues that should increase proportionately to population is 23%. Mays Deposition at 12. The government nowhere contests the accuracy of these figures as a basic outline of the municipality's finances. The City's heavy reliance on profits from the distribution of water and natural gas to the surrounding vicinity provides a powerful reason alone for aversion to annexation of already populated areas. Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the*

> *costs of services*. . . . [Emphasis in original text] [J.S. App. 23a-24a]

This appeal followed.

SUMMARY OF ARGUMENT

1. An annexation violates Section 5 of the Voting Rights Act if (1) it significantly reduces the proportion of voters of a particular race, and (2) the minority race has been denied the opportunity to obtain "representation reasonably equivalent to [its] political strength in the enlarged community." *City of Richmond v. United States*, 422 U.S. 358, at 370-371 (1971). The annexations in question here did not reduce the proportion of black voters in Pleasant Grove nor deny black voters representation equivalent to their political strength in the enlarged community because there were no black voters in Pleasant Grove or the areas annexed. Because the annexations could not conceivably have had the effect of denying blacks the right to vote on account of their race, there is no basis for inferring that that was the purpose.

2. The failure of Pleasant Grove to act favorably on the Highlands' petition, which was brought to the City Council's attention two months after it voted to annex the Western Addition and eight years after it voted to annex the Glasgow Addition, does not invalidate the prior annexation decisions, assuming *arguendo* that the decision on the Highlands' petition had a discriminatory purpose, because Section 5 "clearly provides that it applies only to proposed changes in voting procedures." *Beer v. United States*, 425 U.S. 130, at 138 (1976). Although the issue before the Court in *Beer* was whether a covered jurisdiction was required to demonstrate that a non-change did

not have a discriminatory effect, the language of Section 5 provides no basis for making a distinction in these circumstances between "purpose" and "effect." Accordingly, the rationale of *Beer* covers non-changes with a discriminatory purpose.

3. The Government conceded below that additional revenues to be derived from the Highlands if annexed could not exceed 14% to 28% of additional expenditures. The cost to Pleasant Grove of annexing 79 already built homes in the Highlands rather than taxing the construction of new homes in the Western Addition is $45,820. Accordingly, the conclusion that the annexation of the Highlands is not in Pleasant Grove's interest is clearly correct.

ARGUMENT

I. The annexation of vacant land or land containing one white family by a municipality with no black voters does not deny any black voter the right to vote on account of race or color.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, prohibits a State or political subdivision subject to Section 4 of the Act, 42 U.S.C. §1973b,[6] from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it (1) has obtained a declaratory judgment from the District Court of the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on

[6] The State of Alabama is subject to Section 4. 30 Fed. Reg. 9897 (August 6, 1965).

account of race or color," or (2) has submitted the proposed change to the Attorney General and the Attorney General has not objected to it.

It is established that an annexation constitutes a change in a voting practice or procedure. *City of Richmond v. United States*, 422 U.S. 358 (1975); *Perkins v. Matthews*, 400 U.S. 379 (1971). As the test is set out in *City of Richmond, supra*, at 370-371, an annexation violates Section 5 if (1) it significantly reduces the proportion of voters of a particular race, and (2) the minority race has been denied the opportunity to obtain "representation reasonably equivalent to [its] political strength in the enlarged community."

Because there were no black voters in Pleasant Grove at the time these annexation decisions were taken, only white voters in the Glasgow Addition, and no voters at all in the Western Addition, it is clear that these annexations neither reduced the proportion of black voters in Pleasant Grove nor denied black voters representation equivalent to their political strength in the enlarged community.

Because the proposed annexations could not conceivably have had the effect of denying blacks the right to vote on account of their race, there is no basis for inferring that that was the purpose. As Judge MacKinnon wrote:

> It defies all reason and common sense to attribute to a governmental entity the purpose to achieve something that cannot conceivably be achieved, particularly when it is obviously impossible that the voting rights of any black

citizen could be adversely affected. J.S. App.20b.

A purpose of denying blacks the right to vote in Pleasant Grove would best be served by voting against any annexation because (1) the sale of any house in Pleasant Grove entails the possibility that a black person will buy it,[7] and (2) any voting rights change invites the Justice Department to weigh in as an ally of those substantial forces in Pleasant Grove who affirmatively wish to integrate Pleasant Grove.[8] No as-

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[7] During the pendency of this lawsuit a black family moved into Pleasant Grove. D. 73, p. 66.

[8] These forces include most prominently Councilman Milton C. Russell whose company owned land in the Western Addition and whose company was among the plaintiffs in the case of *Wheeler, et al. v. City of Pleasant Grove*, Civil Action No. 78-G-1150-S, decided April 3, 1984, a case in which Russell, individually, was a defendant as a member of the City Council. This case involved according to the Government's motion to affirm "an exclusionary zoning ordinance that was struck down because of its racially discriminatory effect." Motion to affirm, p. 9. Such a conclusion is no doubt what plaintiffs wished, but the Court's final decision, which was filed below (D. 92, Ex. A), specifically found that "the [racial] discrimination claim was totally without merit" (p. 4) and "the plaintiffs failed to prove any racial discrimination whatsoever" (p. 8) and "there was no showing of racial discrimination" (p. 20). Glen E. Parmley, a councilman between 1968 and 1972 and the prime mover on the City Council with respect to the Glasgow Addition (D. 63, *passim*) was, together with Russell and others, an applicant to approve plans for a 120-unit apartment complex in Pleasant Grove, the opposition to which was racially motivated according to the plaintiffs in *Wheeler, supra*. D. 35, Ex. 15, p. 2. Mayor Patrick and Fire Chief Scholl both voted in favor of the apartment complex as members of the Pleasant Grove Planning Board. D. 35, Ex. 21, p. 1.

pect of the annexation of the Western Addition or the Glasgow Addition tends in any way to exclude blacks from or to minimize their voting rights in Pleasant Grove. The tendency of the annexations with respect to the black presence in Pleasant Grove, *de minimus* though it may be, is to increase the black presence.

II. Pleasant Grove's subsequent failure to annex the Highlands cannot invalidate the decisions regarding the Glasgow and Western Additions because the failure to annex the Highlands was not a change in a voting practice or procedure.

The Justice Department objected to the Glasgow and Western Additions not because it found any fault in those annexations *per se*, but because Pleasant Grove failed to act favorably on the annexation submitted some two months later by the Highlands and Five-Acre Road. J.S. App. 4a; D. 24, Ex. F, p. 1. The district court held "that the failure to annex is a violation of the Act provided discriminatory purpose is shown. . ." J.S. App. 10b. Because Pleasant Grove had not affirmatively shown that there was no discriminatory purpose in the failure to annex the Highlands, the annexation of the Western Addition approved two months earlier by the City Council and the annexation of the Glasgow Addition approved eight years earlier could not be precleared.

This was error.

The residents of the Highlands have never voted in Pleasant Grove. That they do not now vote in Pleasant Grove is thus not a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. §1973c. Section 5 of the Voting Rights Act does not

require preclearance for a failure to change a voting practice or procedure.

This feature of Section 5 was explicitly recognized by this Court in *Beer v. United States*, 425 U.S. 130 (1976), a case in which the City of New Orleans sought preclearance for its reapportionment of the city's councilmanic districts. The district court had denied preclearance upon consideration of how two at-large seats on the seven member council had effected minority voting strength "in the context of all circumstances touching the right to vote in councilmanic elections," *Beer v. United States*, 374 F. Supp. 363, 400 (D.D.C. 1974), although elections for the two at-large seats had been conducted in that fashion since 1954 and were not changed by the proposed reapportionment. On appeal to this Court, however, the United States reversed the position it had taken in the trial court and agreed with appellants that the district court was mistaken in rejecting New Orleans' proposal because it did not eliminate the two at-large seats. This Court wrote:

> The appellants and the United States are correct in their interpretation of the statute in this regard.
>
> The language of §5 clearly provides that it applies only to proposed changes in voting procedures. "[D]iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance [under §5]." U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After, 347. The ordinance that adopted [the reapportionment plan] made no reference to

> the at-large councilmanic seats. Indeed, since those seats had been established in 1954 by the city charter, an ordinance could not have altered them; any change in the charter would have required approval by the city's voters. The at-large seats, having existed without change since 1954, were not subject to review in this proceeding under §5. [*Beer v. United States*, 425 U.S. 130, at 138-139 (1976)]

The rationale of *Beer* clearly covers this case. The reason that a covered jurisdiction need not demonstrate that a non-change does not have a discriminatory effect is that Section 5 does not cover non-changes. Because Section 5 does not cover non-changes at all, a covered jurisdiction also need not demonstrate that a non-change does not have a discriminatory purpose.

The district court and the Government would require as a condition precedent for preclearance of the Western and Glasgow Additions, the annexation of the Highlands which, we respectfully submit, can properly be precleared with difficulty, if at all. Instead of voting as a part of a significant minority in Jefferson County (where two out of eight State Senators in the County delegation were black in 1979), the blacks residing in the Highlands would vote as an insignificant minority in a city where all councilmanic seats are elected at large. D. 24, Ex. A. p 1. Such an annexation would fail both prongs of the test in *City of Richmond, supra*. It would significantly reduce the proportion of black voters in the place where they were voting, and, because of the at-large feature of

Pleasant Grove's system, it would deny black voters representation reasonably equivalent to their political strength in the enlarged community. Furthermore, because in the district court's view Pleasant Grove cannot rebut the inference to be drawn from its past history that it intends to discriminate racially, the district court would have to find that the Highlands' annexation was motivated by a racially discriminatory purpose.

If it seems anomalous that the Government should argue for such a result, that is because it is anomalous. But for this case, the Government has never objected to an annexation where the municipality requesting annexation had no black voters and the area annexed had no black voters. *See* D. 15, pp. 2-4; J.S. App. 22a. What the Government is attempting to do, we respectfully submit, is not to protect the voting rights of the black residents of the Highlands, but to procure for those residents the economic benefits which automatically accrue if the area is annexed to Pleasant Grove at the expense of their rights to reasonably proportionate representation in voting. There is no doubt, as we show *infra*, that the residents of the Highlands would derive great economic benefits from being annexed to Pleasant Grove and that Pleasant Grove would suffer corresponding economic detriment, but that was not the end sought by the passage of the Voting Rights Act of 1965.

III. The conclusion that the annexation of the Highlands to the City of Pleasant Grove would not be in the financial interest of the City is clearly correct.

In the statement of genuine issues attached to the Government's response to Pleasant Grove's motion for summary judgment (D. 35), the Government stated that

it "[d]id not contest" the following material facts asserted by Pleasant Grove not to be in issue:

> "Revenues" provided only 28% of Pleasant Grove's "Total expenditures and transfers" in the fiscal year ending September 30, 1980. Those "Revenues" which could be expected to increase in approximate proportion to population if Pleasant Grove were to annex West Smithfield Manor are approximately 14% of "Total expenditures and transfers." (Mays Affidavit, paras. 3-4, Attachments 2-3) [Plaintiff's statement of material facts attached to Motion for Summary Judgment, Argument III; D. 24][9]

It follows inexorably that Pleasant Grove should not annex developed property. Even if it is true, as the Government asserted below, that the Highlands would be no more an economic burden on Pleasant Grove than are the white residential areas which are already in the city, that would not justify its annexation, since *ad valorem* taxes could only provide approximately 14% to 28% of additional expenses. Development fees constitute an important source of city income,[10] and

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[9] The 14% figure varied somewhat from year to year. In the fiscal year ending September 30, 1983, the figure was 23%. D. 75, p. 12, see Ex. 2.

[10] The two fiscal years preceding the city council's decision in February, 1979, to annex the Western Addition were particularly good years for development. Net revenue from the installation of service lines, mains, and water taps was approximately 19% of the city's income in fiscal 1978 and 31% in fiscal 1977. D. 75, pp. 57, 60, Ex. C to Ex. 8, Ex. C to Ex. 9. Gross fees from building permits were 3.4% of the city's budget in 1978 and 2.7% in 1977 (D. 75, Ex. C to Ex. 8, Ex. C to Ex. 9, Ex. B to Ex. 13), but there is no evidence of record as to associated costs. (Percentages calculated by counsel.)

it is only those fees which make annexation economically advantageous. If Pleasant Grove should decide to bring seventy-nine (79) already built homes into the city by way of annexation of the Highlands instead of building those homes within the city, the city would give up $45,820 in development fees from the 79 houses. D. 75, p. 56, Ex. 14. $45,820 is thus what it costs Pleasant Grove to annex the developed area of the Highlands rather than an area of similar size in the area of the Western Addition.

As Judge MacKinnon wrote in dissent:

> Absent a complete restructuring of the fiscal system, *revenues (taxes) from an already developed area could not possibly even approach the costs of services.* [Emphasis in original] [J. S. App. 24a]

WHEREFORE, appellant respectfully submits that the judgment of the district court should be reversed.

Respectfully submitted,

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